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Issue Date: 19 February 2004

CASE NO.: 2003-MSA-00005

In the Matter of

BUCK MOUNTAIN COAL COMPANY
Petitioner

v.

UNITED STATES DEPARTMENT OF LABOR,
MINE SAFETY AND HEALTH ADMINISTRATION,
ADMINISTRATOR FOR COAL MINE SAFETY AND HEALTH
Party Opposing Petition

Appearances:	Christopher Graver For Petitioner	Edward H. Fitch, Esq. For Party Opposing Petition
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Before: ROBERT D. KAPLAN
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a petition for modification under Section 101(c) of the Federal Mine Safety and Health Act of 1977, (or "Mine Act"), 30 U.S.C. § 811 et seq., and its implementing regulations at 30 C.F.R. Part 44. The Mine Act requires the Secretary of Labor to promulgate and enforce mandatory health and safety standards applicable to the operation of the nation's coal mines. 30 U.S.C. § 811. Buck Mountain Coal Company (or "Petitioner") filed a petition for modification of the mandatory safety standards set forth at 30 C.F.R. § 75.381 as applicable to the Buck Mountain Slope Mine (MSHA Identification No. 36-01962) located in Tremont, Pennsylvania.

I. BACKGROUND

The Buck Mountain Slope Mine (or "Buck Mine") is an approximately 100-year old coal mine located in Tremont, Pennsylvania. During its existence a variety of mining companies

mined coal from the mine. Prior to 2001 the mine was dormant for almost seven years. (T 27 – 28).¹

The Buck Mine has two tunnels that lead into it from the surface. The “rock tunnel” is a tunnel composed almost entirely of conglomerate rock. This tunnel starts on the surface and follows a northeast course underground. The second tunnel starts on the surface farther north than the rock tunnel and follows a southeast course into the mine. The tunnels meet underground at the coal vein where two more tunnels that parallel each other continue deeper underground on an eastward course to the coal face. Together, these tunnels form a connection resembling a letter “Y” rotated 90 degrees counterclockwise. At the present time the rock tunnel provides the only access into the mine. The rock tunnel also serves as an air intake tunnel supplying fresh air to the mine by means of a fan at the tunnel’s entrance. The second tunnel has deteriorated over time due to neglect and the parties agree that it is not safe enough to travel. A map of the mine is in evidence as PX 6. (The rock tunnel and the two parallel tunnels are highlighted in yellow. The second tunnel is highlighted in pink. (T 46 – 57; PX 6)).

At present, Petitioner does not seek to develop the mine or make any new excavations. Petitioner wants to “rob” the remaining pillars supporting the mine.² These pillars remain from prior mining operations that took place deeper in the mine. (T 60).

In 2001 Petitioner notified the Mine Safety and Health Administration (“MSHA”) of its intent to reopen the Buck Mine to rob these remaining pillars.³ Subsequently, Petitioner submitted a mine ventilation plan to MSHA for approval. This ventilation plan included the map (PX 6) showing the rock tunnel to be the sole escapeway from the mine. MSHA performed an inspection of the mine and in an April 24, 2002 report stated that the second tunnel was not travelable due to its deteriorated condition. (GX 1; 2; PX 2). As the mine had only one travelable passageway, MSHA ruled that it was in violation of 30 C.F.R. § 75.381, and issued a citation.⁴ (GX 2; 3). Section 75.381 provides:

- (a) Except as provided in §§ 75.385 and 75.386, at least two separate and distinct travelable passageways shall be designated as escapeways and shall meet the requirements of this section.
- (b) Escapeways shall be provided from each working section continuous to the surface.
- (c) Each escapeway shall be –

¹ The following abbreviations are used herein: “PX” refers to Petitioner’s Exhibits, “GX” refers to Administrator’s Exhibits, and “T” refers to the transcript of the October 15, 2003 hearing.

² “Robbing” is another term for mining coal.

³ Previously, Petitioner operated the Buck Mine with both the rock tunnel and second tunnel open from approximately the mid 1970s until the mid 1980s. In 1985 Petitioner ceased to maintain the second tunnel and began using the rock tunnel as the sole means of traveling into and out of the mine. At that time this single escapeway plan was approved by MSHA. Petitioner operated the mine with the rock tunnel as the sole escapeway from 1985 through 1991.

⁴ Apparently, MSHA also ordered the mine to be closed. Additionally, MSHA also cited Petitioner for failing to submit an up-to-date mine map. (T 110 – 12; GX 3).

- (1) Maintained in a safe condition to always assure passage of anyone, including disabled persons;
 - (2) Clearly marked to show the route of travel to the surface;
 - (3) Provided with ladders, stairways, ramps, or similar facilities where the escapeways cross over obstructions; and
 - (4) Maintained at least 4 feet wide by 5 feet high. If the pitch or thickness of the coal seam does not permit these dimensions to be maintained other dimensions may be approved in the ventilation plan.
- (d) Surface openings shall be adequately protected to prevent surface fires, fumes, smoke, and flood water from entering the mine.
 - (e) *Primary escapeway*. One escapeway that shall be ventilated with intake air shall be designated as the primary escapeway.
 - (f) *Alternate escapeway*. One escapeway that shall be designated as the alternate escapeway shall be separated from the primary escapeway for its entire length.

30 C.F.R. § 75.381.⁵

On May 30, 2002 Petitioner filed a petition with MSHA's Administrator for Coal Mine Safety and Health ("Administrator") seeking modification of the application of the two-escapeway requirement pursuant to 30 U.S.C. § 811(c). Petitioner maintained that using the rock tunnel as the sole escapeway was an acceptable alternative method to the two-escapeway requirement of 30 C.F.R. § 75.381. Petitioner also argued that enforcing the two-escapeway requirement would result in a diminution of safety to the miners. (GX 1).

In a May 23, 2003 Proposed Decision and Order, Administrator denied Petitioner's request for modification. Subsequently, Petitioner requested a formal hearing. A hearing was held before me on October 15, 2003 in Reading, Pennsylvania where the parties had full opportunity to present evidence and argument. On January 2, 2004, Petitioner and Administrator filed post-hearing briefs. Administrator submitted a letter on February 4, 2004 responding to Petitioner's request for alternative relief. The following decision is based upon the arguments of the parties, an analysis of the record, and the applicable law.

II. ISSUES

The following issues are presented for adjudication:

1. Whether an exception to the two-escapeway requirement can be made where one escapeway will provide the same measure of protection.

⁵ Hereinafter, this regulation is referred to as the "two-escapeway requirement."

2. Whether an exception to the two-escapeway requirement should be made because the requirement will result in a diminution of safety to the miners.
3. Whether, in the alternative, Petitioner may simultaneously operate the Buck Mine and rehabilitate the second tunnel in order to satisfy the two-escapeway requirement.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of the Evidence

At the October 15, 2003 hearing, Kenneth G. Hare, who in 2002 was a Supervisory Coal Mine Safety and Health Inspector for MSHA⁶, reiterated much of his August 30, 2002 mine inspection report set forth at GX 1 and PX 5. Hare testified that he inspected the Buck Mountain Slope Mine for MSHA during the week of August 27, 2002. As part of this inspection, Hare examined the rock tunnel. Hare noted that the rock tunnel was supported by substantial timbers, had no loose rock, and was clear of debris. Based on a sound test of the rock tunnel, Hare considered the rock tunnel to be “extremely stable,” and that the rock tunnel’s condition would probably never change. (T 24 – 29). Hare noted that the rock tunnel had several potential sources of fire due to electrical cables and a motorized hoist located inside the rock tunnel. Hare opined that in the event of a fire, the fresh air supply coming through the rock tunnel could spread the fire to the working face of the coal vein. (T 35 – 36). He stated that the damage of fires is the reason why escapeways in coal mines are required to be separated. (T 35).

Hare noted that the second tunnel was in a deteriorated condition and would need to be retimbered in order to be made travelable. In his estimation, retimbering the second tunnel would take 10 miners about four to six weeks to complete. According to Hare, such retimbering is not unusual work for a miner and does not require any special skills. (T 29 – 38).

Hare also stated that he previously inspected the Buck Mine sometime in 1985. Hare stated that, at that time, the second tunnel had deteriorated and was unsafe to travel or maintain, and traveling in it was difficult, taking one-half hour to an hour to travel by walking. During his more recent inspection of the mine in August 2002, Hare noted that traveling the rock tunnel took a few minutes because a miner could ride a motorized car the length of the tunnel. However, Hare stated that both tunnels could easily fill with smoke in the event of a fire. (T 29 – 33).

Lewis Graver, one of three partners in the Buck Mountain Coal Company, testified that he has worked in coal mining since 1963. Based on his experience in mining, Graver estimated that three miners could make the second tunnel travelable in one year’s time. Additionally, Graver considered it to be more dangerous than usual mining activity to enter the second tunnel

⁶ No explanation of Hare’s position or job duties were provided at the hearing. Nor is it clear to me if Hare is still employed by MSHA. However, I infer that Hare has (or had) authority to inspect mines on behalf of MSHA at the time in issue. Additionally, no witnesses were formally offered as experts. However, based on the extensive backgrounds in anthracite coal mining that each witness possessed, I find that all of the witnesses who testified at the hearing are experts in coal mining.

and retimber that passage. According to Graver, “in workings in that condition, there’s always loose rock hanging just waiting to fall.” (T 44). Further, based on the excellent condition of the rock tunnel, Graver could not imagine any safety advantage in using the second tunnel because the second tunnel is almost twice the length of the rock tunnel and has a much steeper grade. Graver also noted that the rock tunnel had a motorized car for quicker transport out of the mine, while the second tunnel did not. (T 42 – 44).

John Kuzar, MSHA District Manager for the northeastern Pennsylvania region, testified that he has worked in a variety of capacities in the mining industry since 1968. Kuzar stated that he has authority to grant waivers from some mine safety and health regulations. However, Kuzar stated that District Managers do not have authority to grant waivers of mandatory safety guidelines such as the two-escapeway requirement. Kuzar recalled that he first became aware of Petitioner’s request for modification of the two-escapeway requirement sometime after Hare’s inspection of the mine in 2002. (T 66, 103 – 104).

Kuzar reviewed the August 13, 1985 letter from Jerry Farmer, Chief of the Office of Engineering Services for Coal Mine Safety and Health, to Edward Connor. (PX 2). Kuzar stated that the letter described the internal layout of the mine. (T 67). According to Kuzar, “. . . they had . . . two escape ways up . . . until they reached the rock tunnel and then the rock tunnel was the only one to the surface.” (T 67). Kuzar stated that such a layout was not consistent with the two-escapeway requirement. Kuzar also reviewed the June 2, 1987 letter from Farmer to Graver in which Farmer approved the mine layout with the rock tunnel as the sole travelable entrance and exit through the mine. (PX 3). However, Kuzar testified that such a layout should not have been approved. (T 68 – 71). According to Kuzar,

If one is providing an equal degree of safety for the miners, I’m talking haulage now, whether it’d be rubber tired or track haulage, I have the authority to grant waivers for that. But with regard to a statutory provision, I do not have the authority to grant a waiver or a petition. That strictly has to go through the administrator, through the petition process.

(T 72). Kuzar noted that a similar approval was given in 1991. (PX 4, T 71 – 79).

Finally, Kuzar admitted that the rock tunnel had not changed in over 17 years and that the tunnel would probably still be travelable over the next 10 to 15 years. However, Kuzar considered that maintaining the rock tunnel as the sole escapeway from the mine was not as safe as the two-escapeway requirement. In the event that the rock tunnel was not available for escape, Kuzar opined that the second tunnel would provide a definite safety advantage. (T 84 – 90).

Robert L. Phillips, Petition Coordinator for MSHA’s Division of Safety, stated that his duties consist of reviewing modification petitions and determining whether petitions should be denied or approved. According to Phillips, when MSHA receives a modification petition, he assigns an investigator to review the petition and inspect the mine. Based upon the determination of the investigator, Phillips may recommend approval of the modification petition,

or may choose to deny the petition and forward the petition to the Administrator for review. (T 92 – 97). Phillips stated that District Managers do not have authority to grant modification requests for the two-escapeway requirement and that such authority rests only with the Administrator. Phillips opined that the prior approvals of Petitioner's modification requests by previous District Managers in 1985, 1987, and 1991 were therefore improper. (T 103 – 104).

Turning to the petition that is the subject of this modification proceeding, Phillips stated that he reviewed Petitioner's modification request. Phillips considered Petitioner's claims that making the second tunnel travelable would result in a diminution of safety and would increase hazards to the miners to rehabilitate the area. In response, Phillips testified:

My view on that, the rehabilitating of that area, that used to be the escape way in '85, is not different than rehabilitating the area at the bottom of that rock tunnel.⁷ It's the same work involved. You had a fall there. You had to clean it up. You had to support it. It's the same thing that you're going to have in the area of where the alternative escape way is. If you've got a fall, you've got to clean it up.

(T 99). Phillips further stated that, irrespective of whether the second tunnel were used as a second escapeway out of the mine, it would need to be inspected on a weekly basis since it was being used as a return air course. (T 100).

Phillips also considered Petitioner's argument that the proposed alternative method (i.e., keeping only the rock tunnel open) was just as safe as the having both the rock tunnel and the second tunnel available. Phillips stated that, “. . . what [Petitioner is] alleging, doesn't equal out to what Congress intended to have two separate and distinct escape ways from the working section to the surface at all times.” (T 101). Further, Phillips testified that,

. . . if you have an emergency situation, you've got two escape ways. You know, you may be able to ride out the rock tunnel . . . [However] if you don't have that alternate escapeway, and just like as I heard testif[ied] previously if that rock tunnel is sealed because of a whatever then we don't know, I don't know, if you had an earthquake and, you know, your plates shifted, it could seal that one off and if you don't have another means of getting out of that mine, you're trapped there . . .

(T 107 – 108).

Phillips stated that while “we've never granted modifications for escapeways,” he explained that the regulations allow two exceptions to the two-escapeway requirement of 30 C.F.R. § 75.381. The first is when a new mine is opened and only 20 miners will be underground. In that circumstance, § 75.385 permits a mining operation to operate with only one

⁷ Hare testified that upon inspection in 2002 he discovered a small collapse of the Buck Mine's roof. This collapse occurred inside the mine in the vicinity of the rock tunnel's junction with the coal vein. (T 28 – 29).

tunnel. Additionally, § 75.386 provides that, “[w]hen only one mine opening is available due to final mining of pillars, no more than 20 miners at a time shall be allowed in the mine, and the distance between the mine opening and working face shall not exceed 500 feet.”⁸ (T 97 – 99).

B. Discussion

1. Using the rock tunnel as the sole escapeway out of the Buck Mine is not an acceptable alternative to the two-escapeway requirement in C.F.R. § 75.381.

Section 101(c) of the Mine Safety Act allows the Secretary of Labor to grant a petition to modify the application of a mandatory standard to a particular mine. 30 U.S.C. § 811(c). A petition for modification of a safety standard at a particular mine will be granted when it is determined

that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard.

30 U.S.C. § 811(c); 30 C.F.R. § 44.4(a)(1). In evaluating an alternative method, a fact-finder must use a two-step analysis. The first step, focusing on the “result” clause, requires a fact-finder to find that the proposed alternative method will promote the same safety goals as the original standard with no less than the same degree of success. United Mine Workers of America v. Mine Safety and Health Administration, 928 F.2d 1200, 1202 (D.C. App. 1991); International Union, United Mine Workers of America v. Mine Safety and Health Administration, 920 F.2d 960, 963 (D.C. App. 1990). The second step, focusing on the “same measure of protection” requirement, requires a more global inquiry into the net safety effect of the modification. Taking into account both advantages and disadvantages of the alternative method, including effects unrelated to the goals of the original standard, the fact-finder must consider how the modification will affect overall mine safety. United Mine Workers of America v. Mine Safety and Health Administration, 928 F.2d at 1202.

In its brief, Petitioner contends that the existing rock tunnel provides a safe, alternative method to the mandatory two-escapeway requirement. In support of this claim, Petitioner puts forth several arguments in support of its position that maintaining the rock tunnel as the sole escapeway guarantees no less than the same measure of protection afforded by the two-escapeway requirement. (Petitioner’s brief, pp. 11 – 20). I address these arguments in turn.⁹

Petitioner’s primary argument is that “it is highly unlikely” that the rock tunnel would ever collapse because it is composed of conglomerate rock, one of the hardest rocks in the world.

⁸ Petitioner does not allege that the exception in § 75.386 applies in this situation. However, I note that § 75.386 requires that the distance between the mine opening and working face shall not exceed 500 feet. Here, the rock tunnel’s length is approximately 900 feet from the mine opening to the working face. (PX 6).

⁹ In addition to the arguments discussed herein, Petitioner also argues in its brief that the granting of modification petitions is not an anomalous situation. (Petitioner’s brief, pp. 5 – 8). I accept Petitioner’s argument that granting modification petitions is not unique. However, I find that this is not dispositive in determining whether I should grant the instant modification request.

Petitioner therefore posits that the rock tunnel is virtually indestructible and there is no need for a second escape tunnel out of the mine. (Petitioner's brief, p. 14).

Considering Petitioner's argument under both parts of the alternative method test, I find that the proposed modification does not promote the same safety goals as the original standard with no less than the same degree of success, nor does it provide the same measure of protection. I note that every witness who testified regarding the rock tunnel's condition agreed that the rock tunnel is extremely stable. Specifically, Hare and Kuzar both stated that the rock tunnel's condition would not deteriorate over time and posed almost no danger of collapsing. On a recent inspection by Hare, the rock tunnel was sound-tested, revealing that the tunnel was "extremely stable." Hare could not detect any loose rock or signs of stress. Additionally, Hare noted that the tunnel was supported by substantial timbers and reinforced with concrete and steel, all of which added to the tunnel's stability. (T 24 – 39, 64 – 90; PX 5).

While this evidence supports Petitioner's argument that the rock tunnel is in no immediate danger of collapse, this seeming invincibility does not preclude the occurrence of a host of other deadly possibilities. Indeed, Hare noted that the rock tunnel had electrical cables and a motorized hoist, both of which he considered to be possible fire sources. In the event of such a fire, Hare noted that the fire would likely spread to the coal face because the rock tunnel was used as the intake air course. (T 35 – 36). Additionally, Phillips stated that plates could shift or an earthquake could occur that might seal off the rock tunnel. (T 107 – 108).¹⁰

Further, Kuzar stated that the two-escapeway requirement was promulgated by Congress as a "result of numerous fatalities due to mine fires, and other occurrences in mines where the one entrance was blocked and [there was] no other means of egress out of the mine." (T 80). Phillips also opined that Congress required two entirely separate and distinct escapeways out of coal mines because of the dangerous conditions inside coal mines. (T 101).

I find that the opinions of Kuzar and Phillips are supported by the legislative history and purpose of the Mine Act. I note that the Court of Appeals for the District of Columbia has held that the primary purpose of the Mine Act is to "protect mining's most valuable resource – the miner." Secretary of Labor v. Cannelton Industries, Inc. 867 F.2d 1432, 1437 (D.C. Cir. 1989). In the report of the Senate committee responsible for drafting the Mine Act, Congress took specific notice of the volatile and unpredictable conditions inherent in underground mining that can kill miners.

At the Sunshine Silver Mine in Idaho, in May, 1972, 91 miners died of carbon monoxide asphyxiation because they did not know how to use self-rescuers or because the failure of mine management to provide a secondary escape route trapped miners as much as a mile underground.

¹⁰ Interestingly, during his 2001 inspection of the mine, Hare observed a roof collapse where the rock tunnel intersects with the coal vein. (T 28 – 29). While this roof collapse did not seal off the rock tunnel, I find that this incident illustrates, at the very least, the possibility that the rock tunnel could be sealed off as a result of an unexpected event.

At Buffalo Creek, in February, 1972, 125 persons died when a dam burst sending a near tidal wave of murky water through the seventeen mile long valley, while the mining enforcement agency questioned its authority to regulate the coal mine impoundment dam in question.

At Blacksville, in July 1972, nine miners at work behind a piece of equipment that caught fire were trapped and died in the mine because those at the scene of the fire had not been adequately trained in emergency procedures.

At Scotia, in March, 1976 twenty-three miners and three Federal inspectors died in two explosions of accumulated methane gas when the mine safety enforcement effort was unable to detect and address chronic conditions of inadequate ventilation in that mine.

Near Tower City, Pennsylvania, in February, 1977, nine miners died when water from an underground source inundated active workings, sending tons of water and debris coursing through the mine.

Sen. Rpt. 95 – 181, at 4 (1977). Additionally, the Federal Mine Safety and Health Review Commission (or “the Commission”) recently noted that the two-escapeway requirement was originally included in § 317(f) of the Federal Coal Mine Health and Safety Act of 1969 (or “Coal Act”), 30 U.S.C. § 801 et seq. (1976), and was incorporated without change into the Mine Act. MSHA v. Akzo Nobel Salt, Inc., 21 FMSHRC 846, 853 (1999). The Commission noted the Senate committee responsible for the drafting of the Coal Act stated,

Mine fires, extensive collapse of roof, or similar occurrences may completely block the regular travelway between the working section and the surface, thus cutting off escape in an emergency unless an alternate route is provided to the surface. As recently as March, 1968, 21 men at a salt mine lost their lives because a second escapeway was not provided.

Akzo Nobel Salt, Inc., 21 FMSHRC at 853 citing Sen. Rpt. 91 – 411 at 83 (1969).

Based on the foregoing, I find that Kuzar’s and Phillips’ opinions regarding Congress’ reasoning for the two-escapeway requirement are supported by the legislative history and purpose of the Mine Act and are therefore entitled to substantial weight.¹¹

Accordingly, I find that maintaining the rock tunnel as the sole escapeway from the mine does not promote the same safety goals as the original standard with no less than the same degree

¹¹ Although Graver testified that he was an extremely experienced miner and always followed proper safety procedures, I find that this does not preclude the fact that an accident *could* still occur, as Congress recognized in the legislative history of the Mine Act. Sen. Rpt. 95 – 181, at 4 (1977).

of success. Additionally, taking into account both advantages and disadvantages of the alternative method, including effects unrelated to the goals of the original standard, I find that keeping the rock tunnel as the sole escapeway does not provide the same measure of protection as the two-escapeway requirement.

Petitioner next maintains that I must consider the specific nature of the Buck Mine mining operation. Petitioner points out that this mining operation only requires two miners underground, and that the miners are (presumably) fully aware of the risk to their safety and health with the rock tunnel as their sole escapeway. (Petitioner's brief, p. 13). However, I find that the miners' apparent willingness to risk greater danger is irrelevant to the alternative method analysis. The analysis here must focus on whether using the rock tunnel as the sole escapeway from the mine is an acceptable "alternative method" that affords those miners the same measure of safety that a second tunnel would provide. Moreover, even considering Petitioner's argument, I do not see any good reason why two miners should not have the benefit of the same safety standards as, say 20 or 30 miners. To reiterate, I find that having only the rock tunnel as a primary means of accessing the mine does not satisfy the requirements of both parts of the "alternative method" test. Consequently, I find that this argument by Petitioner is without merit.

Petitioner also posits that having the second tunnel open as another means of escaping the mine does not provide any safety advantage because traveling the second tunnel takes approximately 45 minutes to one hour whereas traveling the rock tunnel only takes 15 minutes. (Petitioner's brief, p. 15). However, I note that in the event of an emergency in the mine (e.g., a fire or explosion) that makes the rock tunnel unavailable, the second tunnel would be the *only* way out of the mine. Accordingly, I find that this argument is without merit.

Finally, Petitioner asserts that the mine plan using the rock tunnel as the sole escapeway had been approved by MSHA on two previous occasions. Petitioner maintains that it relied upon those prior approvals and had no reason to conclude that such approvals were not valid. Petitioner argues that since MSHA had previously approved the single escapeway plan, to now deny this modification request, "flies in the face of justice and fair play." (Petitioner's brief, pp. 16 - 17). I infer that Petitioner is arguing that Administrator should be barred from enforcing the two-escapeway requirement based on principles of administrative collateral estoppel. See Cite Wide Learning Center, Inc. v. William C. Smith & Co., Inc., 488 A.2d 1310 (D.C. App. 1985).

At the hearing, Kuzar and Phillips both testified that District Managers do not have authority to approve a mining plan that has only one escapeway. Kuzar acknowledged that in 1985 MSHA approved Petitioner's mine plan which proposed using the rock tunnel as the sole escapeway for the Buck Mine. According to Kuzar, this single escapeway mine plan should not have been approved. (T 68 – 71). Neither Kuzar nor Phillips offered any explanation as to why the single escapeway plan was approved at that time.

I find that Petitioner's argument is without merit. Collateral estoppel applies when an agency "is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." Smith, 488 A.2d at 1313; citing United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966). "The threshold inquiry is whether the earlier proceeding is the essential equivalent of a judicial proceeding." William J.

Davis, Inc. v. Young, 412 A.2d 1187, 1194 (D.C. App. 1980). In the instant matter, there is no evidence that MSHA acted in a judicial capacity when it granted Petitioner's prior modification requests in the 1980's. Petitioner and Administrator did not appear as adversaries in a judicial proceeding before MSHA. Additionally, since Hare (an MSHA employee at the time) inspected the Buck Mine and made recommendations to his superiors with MSHA, I find that MSHA acted in an investigatory capacity when it denied Petitioner's 2002 modification request. See Davis, 412 A.2d at 1194 (the Minimum Wage Board acted in an investigatory capacity when it investigated the merits of a complaint and determined an employer owed an employee back wages).

In sum, I find that keeping the rock tunnel as the sole escapeway is not an alternative method that promotes the same safety goals as the original standard with no less than the same degree of success. Considering the net safety effect of the proposed modification, I also find that keeping the rock tunnel as the sole escapeway provides less than the same measure of protection.

2. Application of the two-escapeway requirement in 30 C.F.R. § 75.381 will not result in a diminution of safety to the miners.

Section 101(c) of the Mine Act allows the Secretary of Labor to grant a petition to modify the application of a mandatory standard to a mine when application of the standard would result in a diminution of safety to the miners. 30 U.S.C. § 811(c); 30 C.F.R. § 44.4(a)(2).

Petitioner argues that if it were required to rehabilitate the second tunnel as a secondary escapeway it "would be more dangerous to the miners" due to the deteriorated conditions inside the second tunnel. As support for its contention, Petitioner cites an MSHA Proposed Decision and Order, In the Matter of Mountain Coal Company West Elk Mine ("Elk Mine"), M-98-038-C.¹² (Petitioner's brief, pp. 18 - 19). In that Proposed Decision and Order, MSHA granted a petition for modification and allowed an alternate escapeway to be maintained at a four-foot width, as opposed to the six-foot width required by the regulations. For the reasons that follow, I find that Petitioner's argument is without merit.

At the outset, I note that Phillips considered Petitioner's claim that rehabilitating the second tunnel posed a threat to the safety of the miners. Phillips opined that the hazards of such rehabilitation would not be any different than the hazards associated with coal mining in general. Additionally, Phillips stated that Petitioner already performed similar rehabilitation in the Buck Mine in rehabilitating part of the ceiling at the end of the rock tunnel. Phillips considered this work to be the same as the work required to rehabilitate the second tunnel. (T 99 – 100).

I also note that Petitioner's reliance upon MSHA's decision in Elk Mine is misplaced because that case is entirely distinguishable from the petition in the instant matter.¹³ In Elk Mine, the MSHA Deputy Administrator noted that the mine had an incidence rate higher than the

¹² This Proposed Decision and Order may be found on MSHA's website, www.msha.gov. No date is provided for this decision.

¹³ It is not clear to me if an MSHA decision would be binding precedent on an administrative law judge. Nevertheless, I shall address Petitioner's argument because, at the very least, an MSHA decision would be persuasive authority to some degree.

national average for roof falls. The Deputy Administrator also considered that the alternate escapeway in the mine was located in the belt entry. In Elk Mine, 60 percent of the roof collapses occurred in intersections, where a majority of the belt equipment for the belt entry was located. Consequently, rather than force the petitioner to widen the four-foot alternate escapeway and risk a roof collapse, the Deputy Administrator granted the modification petition. Elk Mine, M-98-038-C. Here, Petitioner has not put forth any evidence that the Buck Mine has an incidence rate for roof falls that is exceptionally high. Nor has Petitioner demonstrated that rehabilitating the second tunnel would create a greater risk of a roof collapse. As previously noted, Mr. Phillips opined that rehabilitating the second tunnel posed no additional risks to the miners, other than those associated with mining in general.

In sum, I find that requiring Petitioner to rehabilitate and maintain the second tunnel as an alternate escapeway would not result in a diminution of safety to the miners in the Buck Mine.

3. Petitioner cannot operate the Buck Mine, and simultaneously rehabilitate the second tunnel without approval from MSHA or the Federal Mine Safety and Health Review Commission.

Petitioner requests that I grant its modification request or, in the alternative, that I allow “an appropriate amount of time to restore and/or provide a separate and distinct secondary escapeway which would comply with said regulation while still operating the coal mine in question.” (Petitioner’s brief, p. 20). In a post-hearing letter dated February 4, 2004, Administrator argues that I do not have authority under 30 C.F.R. Part 44 to grant Petitioner’s request, citing to sections 105 and 110 of the Mine Act. For the reasons that follow, I find that Petitioner’s request must be denied.

Pursuant to the Mine Act, MSHA has authority to issue citations and bring enforcement actions against mine operations which are in violation of the safety standards set forth in the Mine Act. 30 U.S.C. § 814; § 815 (b)-(d); 30 C.F.R. § 100, § 104. Mine operators cited for violations that both contribute “significantly and substantially” to a mine hazard and result from an “unwarrantable failure,” may be issued a withdrawal order. 30 U.S.C. § 814(d)(1). A withdrawal order requires the mine operator to remove all persons, except for certain individuals, from the area affected by the violation until the violation is corrected. 30 U.S.C. § 814(d)(1). A mine operator who seeks to contest an MSHA withdrawal order must either file a request for a conference with MSHA, and establish that the violation has been corrected, or request a hearing before the Federal Mine Safety and Health Review Commission. 30 U.S.C. § 815(d); 30 C.F.R. § 100.6 - § 100.7; see generally, Secretary of Labor, Mine Safety and Health Administration v. Federal Mine Safety and Health Review Commission, 111 F.3d 913 (D.C. Cir. 1997); International Union, United Mine Workers of America v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976).

In the instant matter, counsel for Administrator stated that MSHA ordered the Buck Mine closed due to Petitioner’s failure to rehabilitate the second tunnel and for failing to submit to MSHA an up-to-date map of the mine. (T 101 – 102, 110 – 12; GX 3). Petitioner did not controvert this allegation. While an administrative law judge has authority under 30 C.F.R. Part 44 to grant a petition for a modification of a safety standard, I note that none of the pertinent

statutes or regulations indicate that an administrative law judge has authority to overrule MSHA and allow miners to enter a closed mine. Additionally, as the provisions of 30 U.S.C. 815(d) and 30 C.F.R. § 100.7 have a clearly established review process of MSHA orders before the Commission, I find that Petitioner must contest any MSHA closure order before the Commission and that I do not have authority to allow Petitioner to enter the Buck Mine.

Further, even assuming *arguendo* that I had authority under the modification provisions of 30 C.F.R. Part 44 to allow Petitioner to enter the Buck Mine, I note that Graver testified at the hearing that it would take three miners approximately one year to rehabilitate the second tunnel and make it travelable. (T 42). I find working in the Buck Mine for an entire year without a rehabilitated second escapeway to be unsafe and, as previously discussed, in direct contravention of the safety benefits of the two-escapeway requirement.

Based on the foregoing, I find that Petitioner's request that it be allowed to operate the Buck Mine while simultaneously rehabilitating the second tunnel must be denied.

C. Conclusion

In sum, I find that keeping the rock tunnel as the sole escapeway from the Buck Mine is not an alternative method that promotes the same safety goals as the original standard with no less than the same degree of success. Considering the net safety effect of the proposed modification, I also find that keeping the rock tunnel as the sole escapeway provides less than the same measure of protection. Further, I find that requiring Petitioner to rehabilitate and maintain the second tunnel as an alternate escapeway would not result in a diminution of safety to the miners in the Buck Mine. Finally, I find that Petitioner's request to operate the Buck Mine while simultaneously rehabilitating the second tunnel must be denied.

ORDER

Pursuant to Section 101(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §811(c), it is ORDERED that Buck Mountain Coal Company's Petition for Modification of the application of 30 C.F.R. § 75.381 in the Buck Mountain Slope Mine is hereby DENIED.

It is further ORDERED that Buck Mountain Coal Company's request to simultaneously operate the Buck Mountain Slope Mine and rehabilitate the second tunnel is hereby DENIED.

A

Robert D. Kaplan
Administrative Law Judge

NOTICE OF APPEAL: The Administrative Law Judge's Decision and Order may be appealed by filing a notice of appeal within 30 days with the Assistant Secretary of Labor for Mine Safety and Health, U.S. Department of Labor, Room 622, 4015 Wilson Boulevard, Arlington, Virginia

22203. The notice of appeal shall be served on all parties to the proceeding. 30 C.F.R. § 44.33(a). Within 20 days after filing the notice of appeal, the appellant shall file a statement of objections to the decision of the Administrative Law Judge, and serve the other parties. 30 C.F.R. § 44.33(b).